IN THE

Supreme Court of the United States

October Term, 1977

No. 77-493

CITY OF ATLANTIC CITY, in the County of Atlantic, a Municipal Corporation of the State of New Jersey,
Plaintiff-Respondent,

v.

BLOCK C-11, LOT 11
and
ROSE SCHOENTHAL,
Appellants.

Appeal From New Jersey Supreme Court.

On Motion to Dismiss Appeal.

BRIEF OF PLAINTIFF-RESPONDENT.

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COUNTER-STATEMENT OF THE CASE.

Up to and including the entry of judgment in the Supreme Court of New Jersey, the proofs in this case were that the real estate in question was owned by Rose Schoenthal; that as a part of a property settlement a deed conveying it to her from Synor Co., the record owner according to the proofs submitted by the City, a corporation wholly owned by her husband, had been "purportedly" drawn and recorded.

It was not until a post-judgment "Petition to Clarify Record and/or Enlarge Record" and "Petition for Remand" was filed that Rose Schoenthal averred that as a part of a property settlement she obtained all the shares of Synor Co.

This case was tried on Appellants' position that Rose Schoenthal was owner; proof of mailing was submitted; but in light of the claim of ownership neither party pursued the mailing aspect.

In fact, of the twenty-eight (28) interrogatories submitted to the City on Appellants' post-judgment Motion for Reconsideration, one interrogatory inquired with respect to the mailing, but none inquired with respect to delivery.

If Rose Schoenthal is the owner of the stock of Synor Co., she could have changed its mailing address with the Tax Collector, as she did in or before 1972 with respect to a business property she owned (App. Div. App. Aa-24a), which was prior to the institution of this foreclosure action.

This failure on her part is remarkably similar to that in *Nelson v. New York*, 352 *U. S.* 103, 77 *S. Ct.* 195, 1 *L. ed.* 2d 171 (1956), in which misplacement by an employee of a mailed notice was held not to deprive an owner of procedural due process.

ARGUMENT.

Because the phrase "due process of law" is not defined in the Constitution, and because the varying circumstances and necessities of multitudinous situations in which it is claimed to apply must be taken into account, the requirements of due process frequently vary, depending upon the particular situation presented and the type of proceeding involved.

The circumstances and necessities here involve the exercise of the sovereign power of the State (or its delegates) to impose a tax upon land, without which tax (particularly with respect to its 567 municipalities) such municipalities could not function.

The charge is against the land; the land is the sole security for payment; and the land and not its owner or possessor, is the subject, or entity charged. And universally, the Courts have recognized that owners, or lienors, are presumed to know that taxes will be imposed upon land, and that it will be sold if they are unpaid.

The foregoing was the rationale upon which our Supreme Court, in *City of Newark v. Yeskel,* 5 *N. J.* 313, 319 to 323, finding no Federal or State judicial authority to the contrary with respect to proceedings of this nature (except for an opinion of the *Supreme Court Justices of Maine, p. 318*), affirmed the validity of this Act; with two (2) Justices dissenting because of grave doubts as to its constitutionality, and "To doubt is to deny" (p. 331).

The majority of the Justices in the case upon which review is sought hefe, after reviewing the opinions filed in applicable cases, noted the factual distinction between *Wuchter v. Pizzutti,* a negligence case, in which the statute involved made no provision for service upon the defendant, and that of the instant case, in which *Court Rule 4:64-7(c),* although directory, was followed.

The concurring Justices in the instant case deemed "the statute entirely unexceptionable" in that it was followed "in respect of *publication* and *posting* of notice"; and the same Justices, in the *Township of Montville* case (App. E) adhered to the same opinion.

It is submitted that a holding that identical requirements for notice apply in negligence cases and in cases involving the collection of real estate taxes creates a rigidity in the due process clause which this Court has never countenanced.

The Majority of the Justices of our Supreme Court in the *Montville* case (App. E) held that, notwithstanding its existing rule, notice must be mailed to the "owner" in all foreclosure proceedings presently pending or thereafter filed; with the same Justices who concurred in the instant case dissenting.

Because of the exhaustive review of the decisions of this Court in the opinions of the New Jersey Supreme Court (those of the majority, concurring and dissenting Justices) in the cases of *City of Newark v. Yeskel,* 5 *N. J.* 313 (1950); *Township of Montville v. Block 69, Lot 10,* 74 *N. J.* 1 (1977); and that of the instant case, 74 *N. J.* 34 (1977), the rationale for determining the requirements of the due process clause and its flexibility depending upon the nature of the proceeding; the City does not feel that it can add anything of value to what has been said.

However, because of a similarity of facts (except for the fact that the New York statute required no notice other than by publication and the New Jersey Rule of Court permits, but does not require, mailing of a notice). *Botens v. Aronauer,* 414 *U. S.* 1059, — *S. Ct.* —, 38 *L. Ed. 2d* 464, which was dismissed for want of a federal question, most closely resembles the situation here.

Because:

(a) A copy of the notice of foreclosure was timely mailed to Synor Co. at its last known address as it appears on the last municipal tax duplicate; and

(b) Synor Co. is now admitted to be the actual owner; and

(c) Non-receipt of the mailed notice resulted from the failure to furnish a change of mailing address to the Tax Collector by Rose Schoenthal, if she is the owner of the stock in said Company, at the time she furnished such change with respect to other real estate owned by her in the City; and

(d) The notice provisions in the In Rem Tax Foreclosure Act and the Rule of Court do not contravene the due process clause of the Fourteenth Amendment;

the within appeal should be dismissed on the ground that it does not present a substantial federal question.

Respectfully submitted,

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